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SUSAN LAPSLEY
Director

Date: June 10, 2008

To: Scott Yelenich

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 8(S)**
(CTU 2008-0422-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation an Addendum to DOM 52020 Inmate Count and Movement issued January 16, 2008, by the Sierra Conservation Center

On April 22, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the document you challenge is an underground regulation. The document is titled, "Addendum to DOM¹ 52020 Inmate Count and Movement" (Addendum), issued by the Sierra Conservation Center, a prison within the California Department of Corrections and Rehabilitation (CDCR) system, that says in part:

Effective immediately, all inmates will be prohibited from exposing their upper torso (body) while outside of their respective dormitory and/or housing unit.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).² Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

¹ The DOM is the Department Operations Manual issued by the California Department of Corrections and Rehabilitation.

² Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

Generally, a rule which meets the definition of a “regulation” in Government Code section 11342.600³ is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Penal Code section 5058 establishes exemptions expressly for the CDCR:

(c) The following are deemed not to be "regulations" as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director applying solely to a particular prison or other correctional facility....

This exemption is called the “local rule” exemption. It applies only when a rule is established for a single correctional institution.

In *In re Garcia* (67 Cal.App.4th 841, 845), the court discussed the nature of a “local rule” adopted by the warden for the Richard J. Donovan Correctional Facility (Donovan) which dealt with correspondence between inmates at Donovan:

The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

...

The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the Addendum at issue here applies solely to the inmates of the Sierra Conservation Center. It was issued by the warden at the Sierra Conservation Center, L.D. Clay. Inmates housed at other institutions are controlled by those other institution’s criteria for exposure of inmate torsos. While the DOM is issued by CDCR and applies statewide, the Addendum you challenge is issued by the Sierra Conservation Center, and by its own terms, applies only to inmates at the Sierra Conservation Center. Therefore, the Addendum is a “local rule” and is exempt from compliance with the APA.⁴

³ “Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

⁴ For this reason, pursuant to subdivision (f)(2)(E) of section 270, this rule which is included in a statutory exemption is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

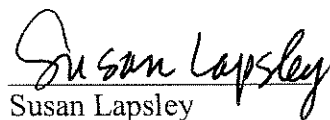
(B) The challenged rule is contained in a California statute.

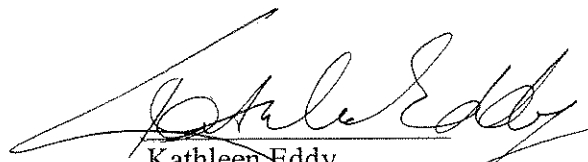
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Date: June 10, 2008


Susan Lapsley
Director


Kathleen Eddy
Senior Staff Counsel

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)